89-1937

No.



IN THE
# SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1989

QUANTUM
CHEMICAL CORPORATION,
*Petitioner,*

*v.*

DISTILLERY, WINE & ALLIED
WORKERS INTERNATIONAL UNION,
LOCAL UNION NO. 32, AFL-CIO,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

## PETITION FOR A WRIT OF CERTIORARI

DAVID N. SHANE
Baker & Daniels
Suite 2700
300 North Meridian Street
Indianapolis, Indiana 46204
(317) 237-0300

*Counsel of Record and Attorney for Petitioner, National Distillers & Chemical Corporation*

## QUESTIONS PRESENTED

1. Should a federal Court of Appeals *sua sponte* in its decision raise and use a fact-sensitive issue to dispose of the case substantively without any prior notice to the litigants or opportunity to present evidence or argument on that issue?

2. Does common ownership and ultimate corporate control of two separate operating divisions of a company suffice to establish a "single employer" relationship between the divisions such that one division is responsible under federal labor law to receive, respond to and arbitrate a grievance respecting the employees of the other division?

3. Should a federal court give deference to a reasonable prior construction by the National Labor Relations Board in determining whether one division of a corporation has a collective bargaining relationship with a union that compels it to arbitrate with the union?

## LIST OF PARTIES AND RULE 29.1 LIST

The parties to the proceeding below were the petitioner here, National Distillers & Chemical Corporation; and the respondent here, Distillery, Wine & Allied Workers International Union, Local Union No. 32, AFL-CIO.

Pursuant to Supreme Court Rule 29.1, petitioner states that National Distillers & Chemical Corporation changed its name to Quantum Chemical Corporation on January 1, 1988. Petitioner is not a subsidiary of any other corporation. The following corporations are non-wholly-owned subsidiaries of the petitioner: Buzzini Drilling Company, Inc.; BBSI, Inc.; Jackson Vangas, Inc.; Lifebank, Inc.; H. W. Loud Co.; Norval Polymers Company; Plateau, Inc.; QJV Corp.; QRM Corporation; Atlantic Energy, Inc.; Fallon Propane and Butane Company; Petrolane Incorporated; Petrolane – Southern New Hampshire Gas Company, Inc.; Tropigas Data Services, Inc.; Tropigas Inc. of Florida; Tropigas USA Inc.; Deltagas N.V.; Petrolane Europe B.V.; Petrolane Offshore Limited; Northwest L.P.G. Supply Ltd.

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No.

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DISTILLERY, WINE & ALLIED
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*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, National Distillers & Chemical Corporation (now named Quantum Chemical Corporation), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit, entered on January 30, 1990, for which rehearing was denied on March 9, 1990.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit has been reported at 894 F. 2d 850 (6th Cir. 1990). It is reprinted in the appendix hereto, p. A-1, *infra*. The order of the United States Court of Appeals for the Sixth Circuit denying rehearing is reprinted in the appendix hereto, p. C-1, *infra*. The opinion of the United States District Court for the Southern District of Ohio (Spiegel, D.J.) has not been reported. It is reprinted in the appendix hereto, p. B-1, *infra*.

## JURISDICTION

Invoking federal jurisdiction under 29 U.S.C. § 185 and 9 U.S.C. § 4, the respondent brought this suit in the Southern District of Ohio. The opinion and order of the Southern District granting summary judgment and compelling arbitration was entered on March 23, 1989. Following a timely appeal, the opinion and order of the United States Court of Appeals for the Sixth Circuit affirming the judgment of the Southern District was entered on January 30, 1990. A timely petition for rehearing was denied by the Court of Appeals on March 9, 1990. The jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS

The pertinent provisions of the federal statutes (9 U.S.C. § 4; 29 U.S.C. § 152(2); 29 U.S.C. § 158(a)(5); 29 U.S.C. § 159(a); 29 U.S.C. § 159(b); 29 U.S.C. § 185) are set forth in the appendix hereto, p. D-1, *infra*.

## STATEMENT OF THE CASE

### A. Statement of Facts

Prior to May 26, 1987, National Distillers & Chemical Corporation ("NDCC") operated a Liquor Division and a Chemical Division.

Although the two Divisions were commonly owned, they operated separately and autonomously.

The two Divisions manufactured different products. The Liquor Division made distilled beverage products for sale to consumers; the Chemical Division made petrochemical intermediates for sale to manufacturers. Neither Division made products for the other.

The Liquor Division had a plant in Cincinnati. The production and maintenance employees at the Liquor Division's Cincinnati plant were represented by the Distillery, Wine & Allied Workers International Union, Local Union No. 32, AFL-CIO ("Distillery Workers Union"). The Chemical Division had no plants in Cincinnati. No Chemical Division plant anywhere had any employees represented by the Distillery Workers Union.

The Chemical Division did have a research laboratory in Cincinnati. That research laboratory had no hourly employees. The Chemical Division paid the Liquor Division to provide maintenance, janitorial and lawn care services to the research laboratory. The Liquor Division used its employees to provide such services. The Liquor Division's Industrial Relations Office controlled its Liquor Division employees, including those it assigned to provide janitorial, maintenance and lawn care services.

The Liquor Division was the named employer party to a collective bargaining agreement with the Distillery Workers Union. The Chemical Division was not party to any agreement anywhere with the Distillery Workers Union.

On May 26, 1987, the Liquor Division was sold to James B. Beam Distilling Co. ("Jim Beam"). As part of the sale, Jim Beam hired all the Liquor Division employees and assumed the Liquor Division's labor contract with the Distillery Workers Union.

On May 27, 1987, after all the Liquor Division employees had become Jim Beam employees, Jim Beam's Industrial Relations Office notified the Chemical Division that Jim Beam was recalling to its plant those Jim Beam employees who previously as Liquor Division employees had provided maintenance, janitorial and lawn care services to the Chemical Division research laboratory.

On June 3, 1987, the Distillery Workers Union mailed a grievance to Chemical Division headquarters. On June 5, 1987, the grievance was returned, with a copy to Jim Beam, because the Chemical Division had no labor contract with the Distillery Workers Union. The Distillery Workers Union never replied.

Instead, on June 15, 1987, the Distillery Workers Union filed with the National Labor Relations Board ("NLRB") an unfair labor practice charge against the Chemical Division. The Regional Director for Region 9 subsequently dismissed the charge, finding that the Chemical Division never had a contractual relationship with the Distillery Workers Union.

## B. Prior Judicial Proceedings

Using 29 U.S.C. § 185 and 9 U.S.C. § 4 as the basis for federal jurisdiction in the court of first instance, the Distillery Workers Union filed litigation seeking to compel arbitration of the grievance, alleging that under state law any part of the corporation should be made to respond to the grievance. The Company defended, asserting *inter alia* that federal labor law controlled the case; that the Chemical Division did not contract to receive grievances from the Distillery Workers Union concerning Liquor Division employees; and that the court should give deference to the finding of the NLRB that the Chemical Division never had a contractual relationship with the Distillery Workers Union. On March 23, 1989, the district court ignored the NLRB's finding and used a state corporate law theory to grant summary judgment for the Distillery Workers Union and compel arbitration. *Distillery, Wine & Allied Workers International Union, Local No. 32, AFL-CIO v. National Distillers & Chemical Corporation*, Case No. C-1-87-0586, *see* p. B-1, *et seq., infra.*

NDCC filed a timely appeal. Following briefs and oral argument, the Court of Appeals for the Sixth Circuit issued a decision which for the first time in the case interjected a theory of a "single employer" relationship between the Chemical Division and the Liquor Division, again ignored the NLRB's finding, and affirmed the district court. *National Distillers & Chemical Corporation v. Distillery, Wine & Allied Workers Union, Local No. 32, AFL-CIO*, 894 F. 2d 850 (6th Cir 1990), *see* p. A-1, *et seq., infra.*

NDCC filed a timely petition for rehearing, on the basis that the Court of Appeals' decision turned on a

theory not raised, briefed or argued prior to the decision, misapprehended the "single employer" theory, and ignored the NLRB's finding. On March 9, 1990, the Court of Appeals denied rehearing, *see* p. C-1, *infra*.

## REASONS FOR GRANTING THE WRIT

Domestic and international corporations frequently purchase or establish new business operations, creating operating divisions rather than subsidiary corporations. The residue of the decision below is to establish a precedent that will compel any part of a corporation to respond to and arbitrate a grievance sent by a union representing employees in some other part of the corporation, so long as both parts are commonly owned and thus subject to the same ultimate corporate control. Such a precedent will confound, not advance, labor relations.

The Court of Appeals' decision below departed from the accepted and usual course of judicial proceedings. It raised, without notice, and without using a fully-developed record, a substantive, fact-intensive issue -- single employer status. Given the Court of Appeals' methodology, petitioner did not know such a fact-sensitive issue was of interest to the Court and had no opportunity to submit evidence or argument directed to that issue.

The superficial analysis of the Court of Appeals' decision -- relying upon common ownership and ultimate corporate control to find "single employer" status -- conflicts with the decisions of other Courts of Appeal that have addressed the same issue.

The decision ignored the finding of the NLRB that the Chemical Division had no contractual relationship with the Distillery Workers Union under the National Labor Relations Act. The decision thus conflicts with the principle established by this Court that federal courts should give considerable deference to a reasonable construction by the Board as to an issue that implicates its expertise in labor relations.

The issues that led to the erroneous decision below -- fair notice to litigants, proper analysis of a fact-sensitive issue, and appropriate recognition of the NLRB's expertise -- are special and important reasons for this Court to exercise its power of supervision.

## I. A Federal Appellate Court Should Not Raise A Fact-Sensitive Issue Sua Sponte In Its Decision To Dispose Of The Case Substantively Without Prior Notice To The Litigants Or Opportunity To Present Evidence And Argument On The Issue

The Court of Appeals below used the NLRB's "single employer" theory to dispose of this case. The first time that theory was raised was in the Court of Appeals' decision. It was not raised, briefed or argued prior to the decision. The Distillery Workers Union's complaint was based on a state contract law concept, as was the judgment of the district court. Neither party raised or briefed a "single employer" theory on appeal, nor was it put in issue at oral argument. The first time NDCC had notice that anyone was suggesting that the Chemical Division was responsible to respond to a grievance under the Distillery Workers Union's labor contract with the Liquor Division because of an alleged "single

employer" relationship to the Liquor Division was after NDCC's receipt of the Court of Appeals' decision.

There are two errors in the Court of Appeals' surprise use of the "single employer" theory in its decision. First, the *ex post facto* notice of the court's interest in and use of the theory denied NDCC a right to be heard on the theory before it was applied. This Court has recognized the litigant's right to know about what it is to be heard. *See, e.g., Morgan v. United States*, 304 U.S. 1, 18, *reh. den.*, 304 U.S. 23 (1938):

> The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one.

The Court of Appeals' surprise use of the "single employer" theory also occurs against a record that was not fully developed with that theory in mind. As noted in the Statement of Facts, *supra*, pp. 3-4, and *infra*, pp. 13-15, what evidence there is in the record rejects a "single employer" finding, but the Court of Appeal's sudden and too-quick application of the theory to a cold and undeveloped record made the erroneously superficial use of the theory easier. Particularly given that a "single employer" issue is to be resolved on a case-by-case basis after analysis of "'all the circumstances of the case,'" *National Labor Relations Board v. Don Burgess Const. Corp.*, 596 F.2d 378, 384 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979), quoting *Local 627, International Union of Operating Engineers v. NLRB*, 518 F..2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd in part, vacated in part, sub. nom., South Prairie Constr. Co. v.*

*International Union of Operating Engineers*, 425 U.S. 800 (1976), the Court of Appeals' surprise use of the "single employer" doctrine on a record developed without awareness of the court's interest in the issue is both unfair and unwise. It warrants use of this Court's power of supervision to issue a summary reversal.

## II. A "Single Employer" Finding Between Two Separate Operating Divisions Of A Company Sufficient To Compel Arbitration By One Under The Labor Contract Of The Other Requires More Than Identification Of Common Ownership And Ultimate Corporate Control

The Court of Appeals below issued a decision based on a "single employer" theory which was not raised, briefed or argued prior to the Court's decision. The Court of Appeals' superficial analysis below is in direct conflict with the approach taken by many other Courts of Appeal.

The "single employer" doctrine began as a jurisdictional analysis for the Board, under which

> the Board considers several nominally separate business entities to be a single employer where they comprise an integrated enterprise, .... The controlling criteria ... are interrelation of operations, common management, centralized control of labor relations and common ownership.

*Radio and Television Broadcast Technicians Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256, (1965). This determination must be based upon "'all the circumstances of the case' and is

characterized as an absence of an 'arm's length relationship found among unintegrated companies.'" *NLRB v. Don Burgess Const. Corp., supra*, 596 F.2d at 384, quoting *Local 627, International Union of Operating Engineers v. NLRB, supra*, 518 F.2d at 1045-46.

Common, centralized control of labor relations is the most important of the four factors, and common ownership is the least important. *See Western Union Corp.*, 224 NLRB 274, 276 (1976), *aff'd sub nom. United Telegraph Workers v. NLRB*, 571 F.2d 665, 667 (D.C. Cir.), *cert. denied*, 439 U.S. 827 (1978):

> It is well settled that a critical factor in determining whether separate legal entities operate as a single employing enterprise is the common control of labor relations policies and that common ownership is not determinative where such requisite common control is not shown.

Indeed, the Board and courts have been extremely leery of utilizing common ownership in any meaningful way, because it is such a constant fact of corporate life in today's world of business conglomerates. *See United Telegraph Workers v. NLRB, supra*, 571 F.2d at p. 667:

> Because common ownership is necessarily a feature of any conglomerate organization, and because common ownership is not determinative where common control is not shown, the Board [properly] held that the union failed to demonstrate that the six corporations were a single employer.

In that case, the Board below had made the logical point that commonality of ownership does not permit an assumption of commonality of control:

> To adopt [that] approach . . . would result in an automatic finding in every case that a wholly owned subsidiary or the constituent companies of a conglomerate are a single employer . . .. But this is contrary to long-established principles followed by this Board.

*Western Union Corp., supra*, 224 NLRB at 275.

Moreover, the Board and courts have found that two unincorporated divisions of the same corporate employer are not automatically covered by the "single employer" doctrine. The fact that two operating entities are both divisions of the same corporation does not keep them from being separate employers under federal labor law. *See, e.g., American Federation of Television and Radio Artists v. NLRB*, 462 F.2d 887, 892 (D.C. 1972) (and cases cited therein). In holding two unincorporated divisions of the same corporation to be separate employers under Section 2(2) of the National Labor Relations Act, 29 U.S.C. § 152(2), despite their corporation's power to control each division, the court stated:

> True, the ultimate power to control each division belonged to Hearst, since each division manager was answerable to Hearst. As the Board correctly held, however, the test is not whether an unexercised power to control exists. There must be in addition such actual or active common control, as distinguished from merely a potential,

> as to denote an appreciable integration of operations and management policies.

462 F.2d at 892. *See also, Local Union No. 391, International Brotherhood of Teamsters v. NLRB*, 543 F.2d 1373, 1376 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 967 (1977) ("Although the ultimate power to control both Mideast and Chattanooga [the divisions] resides in Vulcan [the corporation], in fact that power has not been exercised; on the contrary each division exercises final and independent control over its operations, including its labor relations.... In short, the evidence justifies the finding that the divisions are operated as autonomous enterprises...."); *Los Angeles Newspaper Guild, Local 69 v. NLRB*, 185 NLRB 303, 305 (1970), *enf'd.*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972).

These principles, and the detailed factual analysis of the cases enunciating them, stand in stark contrast to the summary use of common ownership in the Court of Appeal's decision here. That decision, p. A-5, *infra*, deems the common management and common ownership factors to be satisfied by the simple statement that "[b]oth the Liquor and Chemical Divisions were owned and managed by National Distillers." It also deems the interrelation of operations factor to be satisfied merely because "some employees of the Liquor Division were sent to work at the Chemical Division," p. A-5, *infra*, ignoring the fact that the Chemical Division paid the Liquor Division at arm's length for the services provided by its employees.

The decision gives grossly inadequate consideration to the principal factor of centralized control of labor relations, noting only that "[t]here was also central

control of both divisions when the agreement was made," p. A-5, *infra*.

In sum, the Court of Appeals' findings of "single employer" status is based on common corporate ownership and ultimate corporate control of the Divisions. It replaces the requisite detailed factual analysis of the actual operations of each Division to see if they form an "integrated enterprise" with the summary leap from common corporate ownership and ultimate control to "single employer" status.

While focusing too narrowly on the existence of the least important factor, common corporate ownership, the Court of Appeals overlooked such record evidence as does exist. This record evidence is not as substantial as would have been possible had NDCC been given notice of a "single employer" theory and opportunity to supplement the record on remand or on appeal. The record evidence does, however, make clear that it was the Liquor Division, not the Chemical Division, that controlled the labor relations of the employees the Liquor Division assigned to provide services to the Chemical Division's laboratory, and that neither that critical factor nor the others permit a finding of "single employer" status between the two Divisions.

As to the lack of common management: The Chemical Division and Liquor Division operated separately and autonomously. The offices, plants and other locations of the Chemical Division were separate and distinct from those of the Liquor Division. (Joint Appendix submitted by the parties to the Court of Appeals, hereinafter "JA", pages 80-81, ¶ 3)

As to the lack of interrelation of operations: The Liquor Division manufactured distilled products for

consumption; it did not manufacture petrochemical intermediates. The Chemical Division manufactured petrochemical intermediates; it did not manufacture distilled products for consumption. (JA: 80, ¶ 2) The Chemical Division had no plant in Cincinnati (JA: 81, ¶ 4), and none of its employees at plants in other cities and states were represented by the Distillery Workers Union. (JA: 82, ¶ 7) The only Chemical Division location in Cincinnati other than its Division headquarters in Blue Ash and a regional sales office was a research laboratory facility. That facility had no hourly employees. (JA: 81, ¶ 5) When the Liquor Division provided maintenance, janitorial and lawn care services to the Cincinnati laboratory of the Chemical Division laboratory, it used Liquor Division employees and it was paid by the Chemical Division for their services. (JA: 87, ¶ 2)

And, as to the critical factor of lack of centralized control of labor relations: The labor relations management of the Chemical Division was separate from and independent of that of the Liquor Division. The Chemical Division's Employee Relations staff managed all the employee and labor relations activities of Chemical Division employees. (JA: 81, ¶¶ 4-5) The Chemical Division Employee Relations staff was not involved in any employee or labor relations matters of the Liquor Division. (JA: 81, ¶ 6) Bill Herrmann was the Industrial Relations Manager of the Liquor Division's Cincinnati plant and as such controlled the Liquor Division employees who worked there, including those assigned to perform services at the Chemical Division laboratory. (JA: 88, ¶ 3) William J. Smith, to whom the Union directed its grievance, was the Vice-President, Personnel, of the Chemical Division. He

never held any position in or for the Liquor Division. (JA: 8, ¶ 8) The Liquor Division's Cincinnati plant Industrial Relations Office controlled its Liquor Division employees, including those assigned to provide services to the Chemical Division laboratory. The Liquor Division paid them. It made and administered their employment decisions, including hiring, firing, discipline, bidding, bumping, promotion, transfer and assignment. And it did so subject to the labor agreement with the Distillery Workers Union to which the Liquor Division, not the Chemical Division, was the named employer party. (JA: 88, ¶ 3; *see also* JA: 9, 14, 15 and 33)[1] The Chemical Division did not control which Liquor Division employees were directed by the Liquor Division to provide maintenance, lawn care and janitorial services. The Liquor Division sent and pulled back people as its needs dictated. (JA: 88, ¶ 4) Grievances from employees of the Liquor Division were handled by the Liquor Division's Industrial Relations Office. When arbitrations were necessary, the Liquor Division was the employer party to the arbitration. The

[1] The decision (p. A-5-6) also cites comments made from the Liquor Division's perspective. It is natural that the Liquor Division would consider employees it assigned to provide services to the laboratory to be part of its departmental assignments of employees under the Liquor Division labor contract and would arbitrate their grievances filed against the Liquor Division concerning such assignments. From the perspective of the Liquor Division, its labor contract followed its employees on their assignments, no less than a labor contract covering employees of a lawn care or janitorial services company would follow them to assignments at their customers' premises. But the fact that the contract follows the employees does not mean that the customer (here, the Chemical Division) becomes the employer.

Liquor Division's labor relations counsel handled the arbitrations. Neither the Chemical Division nor its Employee Relations staff nor its separate legal counsel were involved. (JA: 88-89, ¶ 5)

The sum of this evidence is that the record evidence does not reflect anywhere near an adequate showing of interrelation of operations, common management or, most importantly, centralized control of labor relations to sustain a finding of "single employer" status. To the contrary, the record evidence compels a conclusion that the Liquor Division and the Chemical Division were separate employers, not a "single employer."

By giving superficial application to the "single employer" theory, the Court of Appeals has created a method of analysis that is in conflict with that used by the NLRB and other Courts of Appeal. The decision below also creates a result entirely at odds with common sense. It contorts the realities of federal labor law beyond all reason to suggest that one division of a company be compelled to accept, process and arbitrate a grievance concerning an alleged violation of a contract covering employees in another division, just because one corporation owns and ultimately could control both divisions. The Court of Appeals erred in leaping to that conclusion here without benefit of the proper analysis.

## III. A Federal Court Should Give Considerable Deference To A Reasonable Construction By The National Labor Relations Board

The National Labor Relations Board is charged by federal law, 29 U.S.C. § 159(a) and (b), with determining whether a collective bargaining

relationship exists, between whom, and concerning what bargaining unit of employees. After the Chemical Division returned the Distillery Workers Union's grievance on the basis that it had no labor contract with the Distillery Workers Union, the Union filed an unfair labor practice charge alleging, *inter alia*, that the Chemical Division had violated Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), by refusing to recognize the Distillery Workers Union. The Regional Director for Region 9 of the NLRB investigated and dismissed the Union's charge against the Chemical Division, finding that the Chemical Division "never had a contractual relationship with the Union." (JA: 198)

This Court has recognized that, where the NLRB has applied its expertise in labor relations, the federal courts should give a reasonable construction by the NLRB considerable deference. *See, e.g., NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 829-30, (1984), reversing the Sixth Circuit's rejection of the NLRB's findings and conclusions:

> We have often reaffirmed that . . . on an issue that implicates its expertise in labor relations, a reasonable construction by the Board is entitled to considerable deference, *NLRB v. Iron Workers*, 434 U.S. 335, 350 (1978); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944).

The Court of Appeals' decision below wholly ignored the Regional Director's finding of the absence of a contractual relationship between the Distillery Workers Union and the Chemical Division under the National Labor Relations Act. In so doing, the Court of Appeals violated the principle of appropriate deference

in areas of the NLRB's labor relations expertise. As such, the Court of Appeals acted in conflict with the applicable principle established by this Court.

## CONCLUSION

For the foregoing reasons, the petitioner respectfully requests that a writ of certiorari be granted to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Respectfully submitted,

DAVID N. SHANE
Baker & Daniels
Suite 2700
300 North Meridian Street
Indianapolis, Indiana 46204
(317) 237-0300

*Counsel of Record and Attorney for Petitioner, National Distillers & Chemical Corporation*

Dated: June 7, 1990

APPENDIX A

No. 89-3265

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

| | | |
|---|---|---|
| DISTILLERY, WINE & ALLIED WORKERS INTERNATIONAL UNION, LOCAL UNION NO. 32, AFL-CIO, *Plaintiff-Appellee,* v. NATIONAL DISTILLERS & CHEMICAL CORPORATION, *Defendant-Appellant.* | ) | ON APPEAL from the United States District Court for the Southern District of Ohio |

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Decided and Filed January 30, 1990

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Before: MERRITT, Chief Judge; WELLFORD, Circuit Judge; and DeMASCIO, Senior District Judge.*

MERRITT, Chief Judge. Defendant National Distillers seeks review of the District Court's order denying its motion for summary judgment and compelling arbitration. We affirm.

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*The Honorable Robert E. DeMascio, Senior Judge of the United States District Court for the Eastern District of Michigan, sitting by designation.

Defendant National Distillers is organized into the Liquor Division and the Chemical Division. National Distillers Liquor Division entered into a collective bargaining agreement with Distillery, Wine & Allied Workers International (the Union). The agreement provided that the Liquor Division would employ only Union members and that any disputes not resolved would be subject to arbitration.

The Liquor Division sent approximately twenty-five employees to the Chemical Division to provide maintenance, janitorial and lawn care services. For some purposes, the employees appear to have been joint employees of both divisions. Although these employees worked at the Chemical Division part time, they remained "employees" of the Liquor Division.

James B. Beam Distilling Company (Jim Beam) bought the Liquor Division from National Distillers in May of 1987, and replaced National Distillers as the employer party to the collective bargaining agreement. The day after the sale was closed, Jim Beam, now the employer of all Liquor Division employees, recalled those workers previously assigned to the Chemical Division. The recalled workers in turn used their seniority to stay at Jim Beam, but less senior employees were less fortunate. Some were demoted while others were terminated altogether as a result of this recall. In order to replace those recalled workers, the Chemical Division hired non-Union employees.

In an attempt to redress these alleged wrongs the Union mailed a grievance to the Chemical Division on June 3, 1987, stating that "on 5-29-87 all union research employees were removed from the plant (25 jobs). Their

work is being performed by non-union employees. Their current contract does not expire until 9-30-88." After the Chemical Division returned the grievance, the Union filed a charge with the National Labor Relations Board (NLRB) against both the Liquor and Chemical Divisions, and Jim Beam. The NLRB refused to issue a complaint and the Union then filed an action to compel arbitration in District Court.

Defendant National Distillers filed a motion for summary judgment essentially claiming that the Union should have directed its grievance to Jim Beam. The District Court denied defendant's motion and ordered them to submit to arbitration. It is from this order that defendant appeals.

The sole issue on appeal is whether this matter should go to arbitration. In order to reach that issue we must determine whether National Distillers, including its remaining Chemical Division, is now bound by the arbitration provisions of the collective bargaining agreement. Although the Chemical Division was not explicitly named in the agreement, we find that as a division of National Distillers, which was a signatory, they are bound. The question then becomes whether the issue of hiring non-Union maintenance employees is subject to arbitration. We conclude that it is.

Although there is a strong federal policy which favors arbitration, *Lingle v. Norge Division of Magic Chef, Inc.*, 108 S.Ct. 1877 (1988); *AT&T Technologies v. Communications Workers of America*, 475 U.S. 643, 650 (1986), courts must decide whether arbitration is appropriate in the first instance. *AT&T Technologies*, 475 U.S. at 649; *John Wiley & Sons v. Livingston*,

376 U.S. 543, 546 (1964). In deciding whether a grievance should go to arbitration, courts may not inquire into the merits of a particular claim. *United Steelworkers of America v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960).

Because collective bargaining agreements are contracts, parties who are not bound should not be obligated to arbitrate a dispute. *Wiley*, 376 U.S. at 547; *Steelworkers*, 363 U.S. at 582. However, "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *Steelworkers*, 363 U.S. at 582-83. Thus, because the collective bargaining agreement at issue in this case might reasonably be interpreted to include former maintenance employees working jointly at the Liquor and Chemical Divisions, we find that this grievance should be arbitrated. We intimate no view of the merits of the arbitrable claim.

While only parties to collective bargaining agreements are bound generally, in some instances a non-signatory to the agreement may be so closely related to a signatory that both are bound. *Crest Tankers v. National Maritime Union of America*, 796 F.2d 234 (8th Cir. 1986); *Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983). The National Labor Relations Board created the single employer doctrine to treat two or more entities as one under the definition of "employer" of section 2(2) of the

NLRA, 29 U.S.C. § 152(2). *Pratt-Farnsworth*, 690 F.2d at 504.

The NLRB employs four factors in determining whether two or more related entities can be considered a single employer: (1) interrelation of operations, (2) common management, (3) centralized control of labor relations, and (4) common ownership. *Radio & Television Broadcast Technicians Local Union 1264 v. Broadcast Serv. of Mobile, Inc.*, 380 U.S. 255 (1965); *see also NLRB v. Don Burgess Constr. Corp.*, 596 F.2d 378 (9th Cir.), *cert. denied*, 444 U.S. 940 (1979). Whether two entities will be considered a single employer depends on the circumstances of the case taken as a whole. *Don Burgess*, 596 F.2d at 384 (citing *Local No. 627, Int'l Union of Operating Eng'rs v. NLRB*, 518 F.2d 1040, 1045-46 (D.C. Cir. 1975), *aff'd in part sub nom. South Prairie Constr. Co. v. Local No. 627, Int'l Union of Operating Eng'rs*, 425 U.S. 800 (1976)).

In this case we believe that the circumstances taken as a whole warrant a finding of single employer status. Both the Liquor and Chemical Divisions were owned and managed by National Distillers, thus satisfying the second and fourth prongs of the *Radio Union* test. There was also a clear interrelation of operations. For example, some employees of the Liquor Division were sent to work at the Chemical Division, thus satisfying the first prong. There was also central control of both divisions when the agreement was made, and the arbitrator will have to decide, among other things, whether the twenty-five maintenance jobs at the Chemical Division were traditionally Union jobs.

Additionally, there is support both in the collective bargaining agreement itself and from past matters that have been arbitrated for a finding of single employer status. The agreement makes several references to "departments," and the Chemical Division was a department of National Distillers. William Herrmann, National Distillers' Industrial Relations Manager, stated in a deposition that the Chemical Division was considered to be one of the bargaining unit departments. Joint App. at 289. In an arbitration hearing in 1981 one of National Distillers' lawyers stated that the maintenance employees of the Chemical Division were covered under the same agreement, and implied that the Liquor and Chemical Divisions were part of a single entity by stating that they were both divisions of National Distillers. Joint App. at 228.

Therefore we hold that even thought the Chemical Division was not a signatory to the collective bargaining agreement, it will still be bound by virtue of its single employer status with the Liquor Division under the umbrella of National Distillers.

Accordingly, the judgment of the District Court compelling National Distillers to arbitrate this grievance is affirmed.

## APPENDIX B

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# UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF OHIO

WESTERN DIVISION

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| | | |
|---|---|---|
| DISTILLERY, WINE & ALLIED WORKERS INTERNATIONAL UNION, LOCAL UNION NO. 32, AFL-CIO, *Plaintiff,* | ) | No. C-1-87-0586 |
| VS. | ) | ORDER DENYING MOTION FOR SUMMARY JUDGMENT AND COMPELLING ARBITRATION |
| NATIONAL DISTILLERS & CHEMICAL CORPORATION, *Defendant.* | ) | |

Before the Court are defendant's motion for summary judgment (doc. 13), plaintiff's response in opposition thereto (doc. 15), and defendant's reply memorandum.

This is an action by plaintiff, a labor organization (hereafter Local Union or Local), against defendant, an employer which employed plaintiff's members at its distillery, bottling plant and research facility (hereafter National Distillers), for breach of contract and refusal to arbitrate a dispute. Plaintiff seeks an order compelling defendant to arbitrate a grievance. Defendant now moves for summary judgment on grounds that it did not violate any labor contract with the local union. The parties have stipulated that the Court may entirely resolve the action through its order on this motion.

Facts

In 1985, the Local Union entered into a collective bargaining agreement with the National Distillers Products Company Division (the Liquor Division) of National Distillers. The contract prohibits performance of work "normally performed by employees in the bargaining unit, which employees now perform or have performed in the past," by persons excluded from the bargaining unit. Article I, ¶ 3, p. 4. Further, the agreement provides that "[n]o such work . . . belonging to employees in the bargaining unit shall be contracted out to, or performed by, any other employer or employees except upon due consultation with the Union. Any disagreement not satisfactorily resolved shall be subject to arbitration." Art. XVI, p. 25. Finally, the agreement is binding upon the parties and their assigns. Art. XXVII, p. 37.

The Liquor Division plants are located west of Interstate Highway 75. The USI Chemicals Company Division of National Distillers (USI) operates a research and development facility to the east of I-75. In the 1950s, the Liquor Division began to provide maintenance, janitorial and lawn care services to the USI facility. The maintenance employees sent by the Liquor Division remained employees of the Liquor Division and were subject to the labor agreement with the local union.

In Fall, 1986, the Liquor Division was put up for sale. On April 8, 1987, James B. Beam Distilling Company (Jim Beam) and National Distillers entered into an Asset Sale Agreement, which provided, in pertinent part, that Jim Beam replaced the Liquor Division as the employer party to the labor agreement

discussed above. The sale was closed on May 26, 1987. On May 27, 1987, all members of the local union were recalled from their maintenance jobs at USI, which was still owned by National Distillers, by their new employer, Jim Beam. These workers used their seniority to remain on the job at Jim Beam; however, this resulted in the termination or demotion of other employees with less seniority. USI hired non-union companies to fulfill its maintenance needs.

On June 3, 1987, the local union mailed a grievance form to USI. The grievance provided that "on 5-29-87 all union research employees were removed from the plant (25 jobs). Their work is being performed by non-union employees. Their current contract does not expire until 4-30-88." USI refused the grievance. The local union filed a charge with the National Labor Relations Board (NLRB) against the Liquor Division, USI, and Jim Beam, alleging that on June 1, 1987, they had refused to bargain collectively with the local. The NLRB refused to issue a complaint on the local unions' charge. This action to compel arbitration followed.

**Standard for Summary Judgment**

Rule 56(c), Fed. R. Civ. P., provides that summary judgment shall be granted if there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. The moving party has the burden of proof, and "the evidence together with all inferences to be drawn therefrom must be read in the light most favorable to the party opposing the motion." *Smith v. Hudson*, 600 F.2d 60, 63 (6th Cir.), *cert. denied*, 444 U.S. 986 (1979). Summary judgment is appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that

party's case and on which that party will bear the burden of proof at trial . . . ." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

Analysis

Defendant contends that it is entitled to summary judgment because (1) the USI division of defendant was never a party to plaintiff's labor agreement; (2) Jim Beam was the employer of plaintiff's members at the time cited in the grievance; and (3) Jim Beam took the action which the local union alleges violated the labor agreement. Plaintiff argues that defendant as a corporation is not an entity separate from its administrative divisions, and therefore defendant was a signatory to the contract between its Liquor Division and the local union. Further, plaintiff asserts that an arbitrator must rule on whether the grievance should have been directed to Jim Beam rather than to defendant or one of its divisions.

Whether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue for the court. *AT&T Technologies v. Communications Workers of America*, 475 U.S. 642, 649 (1985); *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 546-547 (1964). In deciding whether the parties have agreed to arbitrate the grievance at issue, the court may not rule on the merits of the underlying claim. *AT&T Technologies*, 475 U.S. at 649; *Steelworkers v. American Mfg. Co.*, 363 U.S. 564, 568 (1960). If the court decides that arbitration is appropriate, the grievance, no matter how frivolous it appears to the court, must be referred to an arbitrator for decision. *American Mfg. Co.*, 363 U.S. at 568.

The instant motion for summary judgment requires the court to determine whether defendant National Distillers is bound by the provisions of the collective bargaining agreement. This issue goes to the very heart of arbitrability, and consequently is to be resolved by the court. *See Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582 (1960) (holding that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit.").

Preliminarily, we conclude that assignment of the labor contract to Jim Beam would not preclude the union from seeking relief from National Distillers. The labor contract was assigned to Jim Beam prior to the time cited in the grievance, and Jim Beam took the action upon which the grievance is premised. Jim Beam is clearly a successor to the Liquor Division, and as such is bound by the terms of the collective bargaining agreement at issue here. *Wiley*, 376 U.S. at 548; *National Labor Relations Bd. v. Burns Security Services*, 406 U.S. 272, 281 (1972). It therefore had a duty to arbitrate grievances pursuant to the contract. However, assumption by the assignee of an assignor's obligations under the contract assigned does not prevent recovery of damages from the assignor if the assignee fails to fulfill its obligation. 4 A. Corbin, Corbin on Contracts § 866 (1972); Restatement of Contracts § 160(4); 18 Ohio Jur. 3d § 271 (1980).[1] Thus, the filing of a grievance against USI instead of Jim Beam would not defeat the union's action to compel arbitration.

Furthermore, we conclude that defendant National Distillers was a party to the collective bargaining agreement by virtue of its relationship to

the employer signatory to that contract (the Liquor Division of National Distillers). *C.f. National Labor Relations Bd. v. Deena Artware, Inc.*, 361 U.S. 398 (1960) (reversing the dismissal of the Board's petition for adjudication of civil contempt to allow the Board to offer proof that certain subsidiaries were divisions of a single corporate enterprise and thus the enterprise could be held liable for the actions of its alleged divisions or departments). Similarly, we find that mailing the grievance to USI was sufficient to inform National Distillers of its obligations under the bargaining agreement. Accordingly, pursuant to the national policy favoring arbitration of labor disputes, *see AT&T Technologies*, 475 U.S. at 650, we hereby Order defendant to arbitrate the grievance at issue here.

For the foregoing reasons, defendant's motion for summary judgment is denied and defendant is Ordered to arbitrate the union's grievance.

SO ORDERED.

/s/

S. Arthur Spiegel
United States District Judge

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[1] While collective bargaining agreements are to be construed under applicable federal law, *Wiley*, 376 U.S. at 550, neither party has cited, and our research has not disclosed, federal labor law dispositive of this issue. Under these circumstances, we conclude that federal labor policy will be effectuated by recognizing state contract law. *See Textile Workers Union of America v. Lincoln Mills of Ala.*, 353 U.S. 448, 457 (1957).

APPENDIX C

# UNITED STATES COURT OF APPEALS
## FOR THE SIXTH CIRCUIT

No. 89-3265

| | | |
|---|---|---|
| DISTILLERY, WINE & ALLIED WORKERS INTERNATIONAL UNION, LOCAL UNION NO. 32, AFL-CIO, *Plaintiff-Appellee,* | ) | |
| v. | ) | ORDER |
| NATIONAL DISTILLERS & CHEMICAL CORPORATION, *Defendant-Appellant.* | ) | |

Before: MERRITT, Chief Judge; WELLFORD, Circuit Judge; and DeMASCIO, Senior District Judge.*

Upon consideration of the petition for rehearing filed herein by the defendant-appellant, the Court concludes that all of the questions addressed in the petition for rehearing were fully considered upon the original submission and decision of this case.

It is therefore ORDERED that the petition for rehearing be and it hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/
Leonard Green
Clerk

FILED MARCH 9, 1990

*The Honorable Robert E. DeMascio, Senior Judge of the United States District Court for the Eastern District of Michigan, sitting by designation.

## APPENDIX D

## STATUTES INVOLVED

### 9 U.S.C. § 4

*Failure to Arbitrate Under Agreement; Petition to United States Court Having Jurisdiction For Order to Compel Arbitration; Notice and Service Thereof; Hearing and Determination*

> A party aggrieved by the alleged failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration may petition any United States district court which, save for such agreement, would have jurisdiction under Title 28, in a civil action or in admiralty of the subject matter of a suit arising out of the controversy between the parties, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of such application shall be served upon the party in default. Service thereof shall be made in the manner provided by the Federal Rules of Civil Procedure. The court shall hear the parties, and upon being satisfied that the making of the agreement for arbitration or the failure to comply therewith is not in issue, the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. The hearing and proceedings, under such agreement, shall be within the district in which the petition for an order directing such arbitration is filed. If the making of the arbitration agreement or the

failure, neglect, or refusal to perform the same be in issue, the court shall proceed summarily to the trial thereof.

**29 U.S.C. § 152(2)**

*Definitions*

When used in this subchapter —

. . .

(2) The term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act [45 U.S.C.A. § 151 et seq.], as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization.

**29 U.S.C. § 158(a)(5)**

*Unfair Labor Practices*

(a) It shall be an unfair labor practice for an employer —

. . .

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

**29 U.S.C. § 159**

*Representatives and Elections -- Exclusive Representatives; Employees' Adjustment of Grievances Directly with Employer*

(a) Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

*Determination of Bargaining Unit by Board*

(b) The Board shall decide in each case whether, in order to assure to employees the fullest freedom in exercising the rights guaranteed by this subchapter, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof: . . .

**29 U.S.C. § 185(a)**

*Suits By and Against Labor Organizations, Venue, Amount and Citizenship*

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commence as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

No. 89-1937 (2)

IN THE
# Supreme Court of the United States
OCTOBER TERM, 1990

---

QUANTUM CHEMICAL CORPORATION,
*Petitioner,*

v.

DISTILLERY, WINE & ALLIED WORKERS INTERNATIONAL UNION, LOCAL UNION NO. 32, AFL-CIO,
*Respondent.*

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**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## RESPONDENT'S BRIEF IN OPPOSITION

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WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

ROBERT I. DOGGETT
2416 Kroger Building
1014 Vine Street
Cincinnati, OH 45202
*Attorneys for Respondent*

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

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No. 89-1937

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QUANTUM CHEMICAL CORPORATION,
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*Respondent.*

---

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit**

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## RESPONDENT'S BRIEF IN OPPOSITION

---

### STATEMENT OF THE CASE

This case involves an action filed by respondent Distillery, Wine and Allied Workers International Union, Local Union No. 32 ("the Union" or "Local 32") under 29 U.S.C. § 185 to compel petitioner National Distillers and Chemical Corporation ("National Distillers" or "the Company") to arbitrate a grievance.[1] National Distillers had refused to arbitrate the grievance on the grounds that the Union's collective bargaining agreement was not with National Distillers, but with an administrative di-

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[1] Petitioner changed its name to Quantum Chemical Corporation during the proceedings in this case, and has filed this petition under its new name. Since Petitioner was named National Distillers throughout the events at issue in this case and throughout the proceedings in the courts below, this brief will refer to Petitioner as National Distillers.

vision of the Company that the Company had recently sold. The Union contended that National Distillers was bound by the collective bargaining agreement since it was a single entity with its division when the agreement was entered and since it had retained control over the work which was the subject of the grievance.

### A. Statement of Facts [2]

1. Prior to May 26, 1987, National Distillers operated a distillery and an adjacent research facility in Cincinnati, Ohio. The two facilities were located on either side of an interstate highway and were connected to each other by a footbridge over the highway. Pet. App. B2; J.A. 279.

National Distillers operated these facilities through two administrative divisions, the National Distillers Products Company Division ("the Liquor Division") and the USI Chemical Company Division ("the Chemical Division"). Neither administrative division was separately incorporated or otherwise had any status as a distinct legal entity under state law. The research facility was generally operated within the Chemical Division and the distillery was operated within the Liquor Division; however, since the 1950s, all maintenance, janitorial, and lawn care work at the research facility was performed by employees administratively assigned to the Liquor Division. Pet. App. A2, B2. J.A. 281-282.

For many years, the Union represented a bargaining unit of National Distillers' employees performing a variety of jobs at the distillery and performing the main-

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[2] This statement of facts is taken from the statements of undisputed fact in the opinions below and from undisputed parts of the affidavits and exhibits submitted to the District Court with the Union's motion to compel arbitration. These submissions were included in the Joint Appendix submittted to the Court of Appeals. Following the practice of Petitioner, citations to that Joint Appendix are signified as "J.A. ——".

tenance, janitorial, and lawn maintenance work at the research facility. This bargaining relationship generated a series of collective bargaining agreements between the Union and "National Distillers Products Co.—Division of National Distillers & Chemical Corp.". The most recent of these agreements extended from May 1, 1985 to April 30, 1988. Pet. App. B2; J.A. 9.

2. The 1985 collective bargaining agreement contained explicit provisions protecting bargaining unit members from the loss of any bargaining unit work.[3]

Over the years, National Distillers fully recognized that the research facility's maintenance, janitorial and lawn maintenance work was bargaining unit work clearly covered by the Local 32 contract, and Company attorneys had characterized the Company as a unitary employer of those performing this work.

Thus, in a 1981 arbitration, the Company's attorney stressed that the contract covered this research facility work and that the two divisions involved in this work were part of a single entity:

> The maintenance employees of U.S. Industrial Chemicals Company [(the Chemical Division)] are under the same collective bargaining agreement as those working at the National Distillers Products property [(the Liquor Division)], and of course

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[3] *First*, the agreement declares that "[p]ersons excluded from the bargaining unit shall not be permitted to perform any work normally performed by employees in the bargaining unit, which employees now perform or have performed in the past." J.A. 16 (Article I, § 3); *see* Pet. App. B2.

*Second*, the agreement provides that "[n]o such work . . . belonging to employees within the bargaining unit shall be contracted out to, or performed by, any other employer or employees except upon due consultation with the Union. Any disagreement not satisfactorily resolved shall be subject to arbitration." J.A. 26 (Article XVI); *see* Pet. App. B2.

*Third*, the agreement is made explicitly "binding upon the parties and their assigns." Pet. App. B2; *see* J.A. 32 (Article XXVII).

> both National Distillers Products Company and USI are divisions of National Distillers & Chemical Corporation. [J.A. 228, 366 (discussed at Pet. App. A6).] [4]

And, in his deposition, a National Distillers' industrial relations manager stated that the work was sufficiently integrated for "Research" to be considered a bargaining unit "department" under the Local 32 contract. Pet. App. A6; J.A. 289.

3. On April 8, 1987, National Distillers entered into an Asset Sale Agreement under which the distillery and other properties of the Liquor Division were sold to James B. Beam Distilling Company ("Jim Beam") and under which Jim Beam agreed to be bound by the 1985 collective bargaining agreement with the Union. The sale was closed May 26, 1987.

The research facility was not part of the sale, and that facility continued to be owned and operated by National Distillers. Pet. App. A2, B2-B3; J.A. 99, 230-231, 303.

After the sale, however, National Distillers stopped using bargaining unit employees for the research facility's maintenance, janitorial and lawn maintenance work, and began using non-union companies for this work. All the bargaining unit employees at the research facility were ordered to report to the distillery and commence work for Jim Beam. As a consequence of National Distillers refusal to continue to use bargaining unit workers

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[4] Similarly, in a 1983 arbitration, the Company's attorney stated:

> There's no question but that the Company operates a large distilling, rectifying operation on both sides of I-75. There is no question but that Local 32 represents employees on both sides of I-75. There's no question but that Local 32's personnel work in the so-called research or U.S.I., where Henderson works, as well as the distillery and rectifying parts across the way. There's further no question but that persons move from one side of I-75 to the other, and with frequency. [J.A. 228, 374-375.]

at the research facility—and of the transfer of the research facility workers to the distillery—less-senior bargaining unit workers at the distillery were terminated or demoted.

To gain relief for these workers, and to protest the failure of National Distillers to continue to use bargaining unit members to perform bargaining unit work, the Union, on June 3, 1987, filed a grievance with National Distillers. The grievance stated as follows: "[O]n 5-29-87 all union research employees were removed from the plant (25 jobs). Their work is being performed by non-union employees. Their current contract does not expire until 4-30-88." Pet. App. A2-A3. *See also* Pet. App. B3.

4. On June 5, 1987, National Distillers refused the grievance, returning it to the Union on the grounds that National Distillers no longer had a Liquor Division and its Chemical Division had no agreement with the Union. Pet. App. A3, B3; J.A. 86. In response, the Union filed a charge with the Regional Director of the National Labor Relations Board ("NLRB") alleging *inter alia* that National Distillers had refused to bargain in good faith in violation of § 8(a)(5) of the National Labor Relations Act ("the NLRA"), 29 U.S.C. § 158(a)(5). Pet. App. A3, B3; J.A. 197. The Regional Director refused to issue a complaint. J.A. 198.

On July 17, 1989, the Union filed this action in District Court under § 301 of the Labor-Management Relations Act of 1947, 29 U.S.C. § 185, which provides for federal district court jurisdiction in "[s]uits for violation of contracts between an employer and a labor organization."

### B. Statement of the Proceedings Below

1. After the close of discovery, the District Court granted the Union's motion to compel arbitration.

At the outset, the District Court recognized that "[w]hether a collective bargaining agreement creates a duty for the parties to arbitrate a particular grievance is an issue [of law] for the court." Pet. App. B4 (*citing AT&T Technologies v. Communications Workers*, 475 U.S. 642 (1985)). The court also recognized that the issue of arbitrability must be decided apart from any consideration of "the merits of the underlying claim." *AT&T Technologies, supra*).

The District Court then considered the Union's contention that National Distillers "is not an entity separate from its administrative divisions, and therefore was a signatory to the contract between its Liquor Division and the local union." Pet. App. B4. The District Court agreed with the Union that National Distillers and its divisions, were a single employer and that therefore "National Distillers was a party to the collective bargaining agreement by virtue of its relationship to the employer signatory to that contract (the Liquor Division of National Distillers)." Pet. App. A5-A6.

2. On appeal, the Sixth Circuit unanimously agreed that National Distillers and its two divisions must be considered one entity for purposes of the agreement to arbitrate this sort of dispute. Pet. App. A3-A5.

In reaching this conclusion, the court below discussed the "single employer doctrine" which the NLRB had formulated for determining when legally distinct entities should be treated as unitary employers. Pet. App. A5 (*citing Radio & Television Broadcast Technicians v. Broadcast Service*, 380 U.S. 255, (1965)). Stressing that the test "depends on the circumstances of the case taken as a whole," the court assessed the relevant undisputed facts here and found "single employer status." Pet. App. A5.

*First*, the court concluded that National Distillers' structure justified the conclusion that the Liquor and Chemical Divisions had been under common ownership and management. Pet. App. A5. *Second*, the court focused on the substantial interchange of employees between the divisions to find a significant "interrelationship of operations." *Id.* *Third*, the Sixth Circuit found common labor relations control over the work at issue, emphasizing that (a) the two divisions were under common control *at the time of the contract's negotiation*, (b) the text of the agreement and its prior interpretations made clear that the agreement governed the labor conditions of the research facility positions in question, and (c) in prior arbitrations National Distillers' lawyers had implicitly treated the two divisions as "part of a single entity." Pet. App. A5-A6.

## ARGUMENT

The instant petition devotes itself almost entirely to arguments that the court below erred. We will show that petitioner's assertions of error are wholly without basis; moreover, the fact-dependent issues raised here simply have no importance beyond this case.

### I. PETITIONER'S FIRST QUESTION MISCHARACTERIZES THE DECISION AND RECORD BELOW

Petitioner's principal argument is that the Court of Appeals decided this case on the basis of "the NLRB's 'single employer' theory," and that—because this theory "was not raised, briefed or argued prior to the decision" —petitioner was denied the ability to formulate legal and factual arguments "on the theory before it was applied." Pet. 7-8.

From beginning to end, this argument is frivolous.

A. The notion that this Court should review and reverse the judgment of a court of appeals because that

court conducted relevant legal research beyond the specific legal doctrines and cases cited in the parties' briefs and arguments has no support in law or reason. Petitioner's contention is *not* that it had no notice of the general legal claims at issue: from the outset the Union openly contended that National Distillers was "a single entity" and that its divisions had "no separate entity status." Brief of Plaintiff-Appellee, *Distillery, Wine and Allied Workers v. National Distillers*, Sixth Circuit No. 89-3265 ("Union Appeals Br."), at 10. *See also* J.A. 212 (same argument made in Union's district court brief). Rather, Petitioner's contention is that—although it knew the Union's general "single entity" theory of the case—Petitioner had no way of knowing that the NLRB's law on "single entity" status might be important.

We submit that it is wholly without substance to contend that a court of appeals' examination of relevant—though not specifically cited—federal precedents constitutes such reversible error as to require this Court's plenary review.[5]

B. Petitioner's argument is also *untrue as a matter of fact.* The Union had supported its "single entity" theory with citations both to general corporate law and *federal labor law*, arguing that National Distillers must be considered a unitary entity under all of these sources. Among the federal cases cited and discussed were cases which specifically examined the NLRB's "single employer" doctrine and the NLRB's closely related "alter

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[5] The only case cited by Petitioner in support of its theory of error is *Morgan v. United States*, 304 U.S. 1, 18 (1938). *See* Pet. at 8. The petitioner in *Morgan* was not simply complaining of "surprise" at a decisionmaker's reliance on publicly available precedents that had not been specifically cited—as is the Company here—rather, the *Morgan* petitioner complained of the complete absence of any notice prior to an administrative hearing of what the nature of the administrative charges to be heard would be.

ego" doctrine. And, indeed, the Sixth Circuit's discussion of "single employer" doctrine relies in part on one of the "single employer" cases cited in the Union's brief and on other cases which were cited and discussed in the case which the Union had cited. *See* Pet. App. A4-A5; Union Appeals Br. at 14-15; J.A. 214-215 (Union's district court brief).[6]

C. The utter lack of merit to Petitioner's contention that it was given no notice of the NLRB's "single employer" doctrine is demonstrated by Petitioner's own court of appeals' reply brief. In that brief, Petitioner explicitly recognized that the Union had relied on the NLRB's "single employer" doctrine, but then cavalierly dismissed that doctrine as irrelevant. *See* Reply Brief of Defendant-Appellant, *Distillery Wine & Allied Workers Union v. National Distillers*, Sixth Circuit No. 89-3265 ("Company Appeals Reply Br."), at 2 n.1.[7]

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[6] The Union's briefs below specifically relied on two federal cases which had elaborated and discussed the NLRB's "single employer" doctrine. One of those cases, *Crest Tankers v. NMU*, 796 F.2d 234, 237-238 (8th Cir. 1986), extensively discussed the NLRB's "single employer" and "alter ego" doctrines and explained their relevance to the issue of when "an employer which has not signed a labor contract may be so closely tied to a signatory employer as to bind them both to the agreement." The other case, *NLRB v. Borg Warner Corp.*, 663 F.2d 666, 668 (6th Cir. 1981), *cert. denied*, 457 U.S. 1105 (1982), reviewed an NLRB finding of "single employer" and "alter ego" status for various legally separate entities. *See* Union Appeals Br. at 14-15; J.A. 214-215.

The Sixth Circuit's discussion of NLRB "single employer" doctrine relied in part on *Crest Tankers*, and relied further on *Carpenters v. Pratt-Farnsworth*, 690 F.2d 489 (5th Cir. 1982), *cert. denied*, 464 U.S. 932 (1983), and *Radio & Television Broadcast Technicians, supra*, both of which are prominantly discussed in *Crest Tankers*. *See* Pet. App. A4-A5; *see also Crest Tankers, supra*, 796 F.2d at 237.

[7] In this footnote, the Company asserted that cases like *Crest Tankers* and *Borg Warner* were irrelevant because the instant case involves "neither . . . [an] alter ego nor single employer" situation.

## II. PETITIONER'S SECOND QUESTION IS AN EFFORT TO REARGUE THE PARTICULAR FACTS OF THIS CASE AND PRESENTS NO ISSUE OF RELEVANCE BEYOND THIS CASE

A. Petitioner's second question presented (*see* Pet. 9-16) asserts that the Sixth Circuit drew improper inferences from the particular facts of this case with the result that the court below gave undue weight to certain of the factors relevant in determining "single employer" status. *See* Pet. 12 (criticizing court below for insufficiently "detailed factual analysis" of single employer factors) *id.* (court gave "grossly inadequate consideration" to various factors); Pet. 12-16 (rearguing factual inferences).

Petitioner's contention in this regard raises no issue of federal law that goes beyond the particular facts of this case, and thus no issue worthy of consideration by this Court. And, as we now show, Petitioner's criticisms of the decision below are once again without merit.

B. Petitioner relies for its criticism of the Sixth Circuit decision on three cases, which are cited for the proposition that "two operating entities [which] are both divisions of the same corporation [may be] separate employers" under federal labor law. *See* Pet. 11-12 (*citing Local 391, IBT v. NLRB*, 543 F.2d 1373, 1376 (D.C. Cir. 1976), *cert. denied*, 430 U.S. 967 (1977); *AFTRA v. NLRB*, 462 F.2d 887, 892 (D.C. Cir. 1972); *Los Angeles Newspaper Guild, Local 69*, 185 NLRB 303, 305 (1970), *enf'd*, 443 F.2d 1173 (9th Cir. 1971), *cert. denied*, 404 U.S. 1018 (1972)). Petitioner's reliance on these cases is entirely misplaced.

These cases do not say that administrative divisions *must* be treated as separate employers. Nor do they deny that an entity's status as an unincorporated administrative division is a factor militating *against* separate employer status. They stand only for the proposition that

divisions *may* be treated as separate employers, *where the totality of the relevant circumstances supports such treatment.* The facts in this case are far different from those in the three cited cases, and the facts here clearly support the Sixth Circuit's finding of *single* employer status.

In finding "separate employer" status, the three cited opinions all stressed that there had been *no* regular interchange of employees betwen divisions and *no* involvement of one division in the subject matter of the labor dispute at the other division. *See, e.g., Local 391, IBT, supra.* 543 F.2d at 1374 ("no line of advancement for employees between divisions . . . no interchange of employees between divisions"); *AFTRA v. NLRB, supra,* 462 F.2d at 891-892 (no employees at one division represented by union at issue); *Los Angeles Newspaper Guild, supra,* 185 NLRB at 304 ("no transfer of employees among divisions"). The same cannot be said of this case, which involves a contract that was signed by officials of the Company and that was intended to govern and preserve jobs that were (a) always subject to joint control by the two divisions of the Company, (b) were always staffed by employees moving from one division to another, and (c) were now being eliminated by that part of the Company claiming to be a stranger to the contract.

Given this context, the court of appeals reasonably focused on job interchange and common control over the shared work, factors which were not present in the cases cited. *See* Pet. App. A5-A6. This was precisely the proper analysis.[8]

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[8] A recent article on the NLRB's single employer doctrine stresses another major difference between the three cases cited by Petitioner and this one. Each of the cases cited involved secondary boycott charges aginst a union for picketing "neutral" divisions of companies during disputes with other divisions of those companies. The Board has been far more demanding before finding single employer status in such secondary boycott cases than it has been in other cases, because of "the strong congressional policy favoring

## III. PETITIONER'S THIRD QUESTION MISCONSTRUES THE CONCEPT OF DEFERENCE TO THE NLRB

Petitioner closes its petition with an argument that the court of appeals erred in not "giv[ing] considerable deference" to the Regional Director of the NLRB who had not issued a complaint on the Union's NLRA § 8 (a)(5) charge. Pet. 16. Petitioner urges such deference on the basis that the NLRB is generally entitled to deference regarding its authoritative interpretations of the NLRA. Pet. 17.

In making this argument, Petitioner entirely ignores that, whatever deference may be owed to the NLRB when the Board authoritatively construes the Act, no analogous deference is owed an NLRB Regional Director when he informally investigates factual matters and exercises his wide discretion not to issue a complaint. *See Vaca v. Sipes*, 386 U.S. 171, 182 & n.8 (1967) (NLRB General Counsel has "unreviewable discretion to refuse to institute . . . complaint" and may exercise this discretion despite legal wrongs suffered by individual parties).

*First*, a refusal to issue a complaint is *not* an authoritative decision on the merits by the Board. *See Thomas v. Consolidated Coal Co.*, 380 F.2d 69, 77-78 & n.12 (4th Cir. 1967) ("a refusal by the [General Counsel of the]

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the protection of neutrals in labor disputes." Befort, *Labor Law and the Double-Breasted Employer: A Critique of the Single Employer and Alter Ego Doctrines and a Proposed Revision*, 1987 Wisc. L. Rev. 67, 76 (citing *AFTRA*, 185 NLRB 593, 598, 600 (1970), *enf'd*, 462 F.2d 887 (D.C. Cir. 1972), which emphasizes importance of secondary boycott issue to single employer analysis).

Petitioner's exclusive reliance on secondary boycott cases here—*viz.*, in an arbitration context—is thus particularly inappropriate, since in *this* context particularly strong public policies *favor* a "single employer" finding. *Cf. Steelworkers v. Warrior & Gulf Navigation*, 363 U.S. 524, 582-83 (1960) (presumption should be in favor of interpreting contracts to support arbitration).

National Labor Relations Board to file a complaint is not a final decision on the merits"); *Teamsters Local 290 v. Schilling*, 340 F.2d 286 (5th Cir. 1965) "mere refusal by the General Counsel to issue a complaint is not necessarily based on the evidence or the merits").

*Second*, while the NLRB has primary authority to construe the NLRA, it has no authority superior to that of the courts in the area of construing and applying collective bargaining agreements, and certainly a single NLRB Regional Director has no such superior authority. *Cf. Vaca v. Sipes, supra*, 386 U.S. at 182 & n.8; *Smith v. Evening News Ass'n*, 371 U.S. 195 (1962).

Although Petitioner asserts error here, it cites absolutely *no* authority supporting the novel theory of deference that it asserts. Thus, once again, Petitioner's proffered question is wholly unworthy of this Court's plenary consideration.

## CONCLUSION

For the reasons stated, this Court should deny the petition for writ of *certiorari*.

Respectfully submitted,

WALTER KAMIAT
LAURENCE GOLD
(Counsel of Record)
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390

ROBERT I. DOGGETT
2416 Kroger Building
1014 Vine Street
Cincinnati, OH 45202
*Attorneys for Respondent*